

FAIR WORK COMMISSION

AM2021/63; AM2024/11

APPLICATIONS BY AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

SUBMISSIONS IN REPLY TO THE ANMF

AGED & COMMUNITY CARE PROVIDERS ASSOCIATION LTD

AUSTRALIAN BUSINESS INDUSTRIAL

(“THE JOINT EMPLOYERS”)

16 MAY 2024

BACKGROUND

1. On 4 April 2024, Justice Hatcher gave directions in the Work Value Case – Nurses and midwives (**the Directions**). Three questions were posed to the Australian Nursing and Midwifery Federation (**ANMF**):
 - (a) *“whether the registered nurse level 1, year 1 benchmark minimum rate of pay (aligned with classification C1(a) in the C10 Metals Framework) should apply to a registered nurse holding a three-year or a four-year university degree (refer paragraph [204] of the Stage 3 decision [2024] FWCFB 150)” (the RN issue);*
 - (b) *“which enrolled nurse classification should correspond to the new Level 6 – Team Leader direct care employee classification in the Aged Care Award 2010 (refer paragraph [205] of the Stage 3 decision)” (the EN issue); and*
 - (c) *“what the minimum rate increments within each classification of registered and enrolled nurses, and the relativities between those classifications, should be, including the relativity between a registered nurse holding a three-year university degree and one holding a four-year university degree (refer paragraph [207(1)] of the Stage 3 decision)” (the minimum rate increments and relativities issue).¹*
2. The ANMF filed a response to those questions on 26 April 2024 (**the ANMF Submissions**), together with evidence in support.²
3. Pursuant to Item 4 of the Directions, we file submissions in reply to the ANMF Submissions.³ This submission addresses three issues:
 - (a) the RN issue;
 - (b) the EN issue; and
 - (c) the minimum rate increments and relativities issue.

¹ Directions - AM2021/63; AM2024/11 (Justice Hatcher, 4 April 2024) at [3].

² Statement of Julianne Bryce dated 26 April 2024; Statement of Tanya Vogt dated 23 April 2024; Statement of Heila Brooks dated 22 April 2024; an Excel spreadsheet showing the calculations feeding into the various relativities and rates of pay that were used to populate the rates in the Nurses Award.

³ Directions - AM2021/63; AM2024/11 (Justice Hatcher, 4 April 2024) at [4]. It is noted that the ANMF Submission also addresses the draft determinations per the invitation to comment in the *Stage 3 Decision* [2024] FWCFB 150 at [279]. No reply is made with respect to those submissions.

SUMMARY OF POSITION

4. If the Expert Panel adopt the reasoning in *Teachers* that classifications primarily based on periods of service are inappropriate to place in a modern award, then the Expert Panel will need to consider changes to some parts of the EN and RN classification structures that reasonably appear to reflect this.
5. Having said this we also accept the implicit reasoning in *Teachers* that certain periods of time (such as 3-4 years) do allow employees to gain a level of increased competence and proficiency that could enliven work value considerations.
6. Such an approach is consistent with the *Stage 3 Decision* as it applies to the direct care employee—level 4—senior classification, where a period of 4 years' post-qualification industry experience has been taken to reflect a material change in applied competence and proficiency to enliven work value considerations.
7. In considering any potential changes to the EN and RN classification structure concerning annual service-based increments, the notion in paragraph [5] and [6] above should be considered.

THE RN ISSUE

8. The position set out at paragraph [3] of the ANMF Submissions is a joint position of the Joint Employers and the ANMF.

THE EN ISSUE

9. The position set out at paragraphs [5]-[6] of the ANMF Submissions is a joint position of the Joint Employers and the ANMF.
10. We are still working through potential language in the EN classification definitions to give effect to that position.⁴
11. We are seeking to ensure that the notion of “*supervision*” is broad enough to comprehend ‘*general supervision*’ of PCWs in addition to the limited notion of technical ‘*clinical supervision*’ which is consistent with the *Stage 3 Decision*.
12. Three observations are made:

⁴ See ANMF Submissions at [6].

- (a) It is not controversial that the EN works under the indirect or direct supervision of the RN. This is expressly referred to in both the classification definitions of the EN⁵ and RN.⁶
- (b) It is not controversial that ENs may provide support and supervision to direct care employees.⁷ That supervision is “*general*” in that it is focused upon ensuring care is provided in accordance with the care plan, established protocols and guidelines. This may be contrasted with the supervisory role of the RN as “*clinical leader*”⁸ – who has “*ultimate supervisory responsibility*”.⁹
- (c) The reference to “*under the supervision*” of an EN in the new definition of “*aged care employee—direct care*” captures the prospect for that general category of supervision.¹⁰ There is no equivalent reference in the *Nurses Award*.

THE MINIMUM RATE INCREMENTS AND RELATIVITIES ISSUE

Relevant principles

13. The Expert Panel has made two observations about the classification structure in the *Nurses Award*:
- (a) “*each classification allows for automatic annual increments in pay*”; and
 - (b) “*classifications of this type*” have been held to be “*an anachronism in the context of the current statutory regime for the fixation of minimum wage rates*”.¹¹

⁵ For example, an EN pay point 3, 4 and 5 refer to “*limited direct supervision*” and “*minimal direct supervision*”.

⁶ See example, *Nurses Award 2020*, Sch A, clause A.5.1(b).

⁷ See *Stage 3 Decision* [2024] FWCFB 150 at [226]. See generally, *Stage 3 Decision* [2024] FWCFB 150 at [179]-[180], [193]. See example, Report to the Full Bench (Commissioner O’Neill, 20 June 2022) at [97]. See also Nursing and Midwifery Board of Australia, *Enrolled Nurse Standards for Practice* (1 January 2016) at [3.8].

⁸ See generally, *Stage 1 Decision* [2022] FWCFB 200 at [647], [739].

⁹ *Stage 3 Decision* [2024] FWCFB 150 at [188].

¹⁰ See Draft Determination Aged Care Award (published 15 March 2024).

¹¹ *Stage 3 Decision* [2024] FWCFB 150 at [207(1)], citing *Application by Independent Education Union of Australia* [2021] FWCFB 2051 at [647] (**Teachers**).

14. Since pre-modernisation, a classification structure based on “*service increments*” has been categorically held to be “*inappropriate*”.¹² The observations of the Australian Industrial Relations Commission are instructive:
- (a) “*increments which are not based on work value should not appear in minimum rates awards*”;
 - (b) “[i]n our view the abolition of advancement between **pay points based primarily on service** is also consistent with increased flexibility and the encouragement of agreement making”;
 - (c) “[w]hen the Commission is fixing appropriate minimum rates in awards which contain increments it will be necessary, **subject to exceptions**, to make arrangements for increments to be phased out”;
 - (d) “[a]dditional payments which are geared **primarily to length of employment** are not consistent with properly fixed minimum rates because they are not based on work value”; and
 - (e) “[w]here the relevant award **does not make progression through the incremental scale dependent on changed work value**, the incremental payments cannot be treated as part of the minimum rate. Where it can be demonstrated, however, that incremental payments were included in the award pursuant to the relevant work value principle or on grounds of structural efficiency and work value, the retention of such payments is permissible”.¹³
15. In *Teachers*, the Full Bench held that retaining a classification structure “*based on years of service rather than the essential elements of qualifications, displayed competence and acquired experience and responsibility*” is problematic and inappropriate.¹⁴
16. This said, a certain level of experience in an occupation will usually lead to an incrementally higher level of applied competence which may have work value relevance after a period of years, even if the nominal role of the employee has not changed.

¹² See *Paid Rates Review Decision* [1998] AIRC 1413, 123 IR 240, Print Q7661; *Teachers* [2021] FWCFB 2051 at [647].

¹³ *Paid Rates Review Decision* [1998] AIRC 1413, 123 IR 240, Print Q7661 (emphasis and underlining added).

¹⁴ *Teachers* [2021] FWCFB 2051 at [647].

17. However, the reasoning in *Teachers* makes it clear that evidence must be adduced to suggest that the work value of a particular role *increases* year by year.¹⁵ Absent such evidence it is not appropriate, as suggested by the ANMF, to simply maintain yearly increments “*to reflect this idea*” of general increase in work value year-to-year:¹⁶ to do so would be entirely contrary to the reasoning in *Teachers*.
18. The *Stage 3 Decision* held that the pay rates in the *Nurses Award* were not properly fixed minimum rates because of the principles set out in the *Paid Rates Review Decision* and the *ACT Child Care Decision*.¹⁷ The conclusion was also supported by reference to the historical development of the *Nurses Award 2010*.¹⁸
19. Reference to the historical development of the *Nurses Award 2010* does not support a conclusion that the incremental scale of pay points for each RN level are based on applied competence or acquiring experience and responsibility occasioning a discernible change in work value akin to a new classification.
20. It is even less clear with respect to the EN structure.¹⁹
21. None of the findings in the *Stage 1 Decision* or the *Stage 3 Decision* support a conclusion that the work value of an EN, RN or NP increases years by year simply by the effluxion of time; after 365 days.
22. Further, in contrast to the 4-years’ post qualification marker for direct care employees²⁰ – no equivalent marker was identified with respect to ENs or RNs.²¹

¹⁵ *Teachers* [2021] FWCFB 2051 at [647].

¹⁶ See ANMF Submission at [69].

¹⁷ *Stage 3 Decision* [2024] FWCFB 150 at [135].

¹⁸ *Stage 3 Decision* [2024] FWCFB 150 at [207(2)], [111]-[135]. See also *Stage 1 Decision* [2022] FWCFB 200 at [942]-[955].

¹⁹ See *Stage 3 Decision* [2024] FWCFB 150 at [111]-[135].

²⁰ See *Stage 3 Decision* [2024] FWCFB 150 at [195]: that marker recognises “*that such a period of industry experience carries with it an enhancement in work value through the on-the-job acquisition of additional skills, experience, responsibilities and judgment*”.

²¹ The Stage 1 evidence consisted of 3 ENs, 5 RNs and 2 NPs, that evidence does not support a conclusion that the year-to-year progressions are based on displayed competence and acquired experience and responsibility. See ENs: See Witness Statement of Suzanne Hewson, dated 6 May 2022; Witness statement of Wendy Knights, dated 6 May 2022; Witness statement of Patricia McLean, dated 6 May 2022; RNs: See Witness Statement of Irene McInerney, dated 29 October 2021; Witness Statement of Jocelyn Hofman dated 29 October 2021; Witness Statement of Lisa Bayram dated 29 October 2021; Witness Statement of Maree

23. There is no proper basis in principle, nor an exception enlivened by reference to the evidence, to justify annual increments in the classification structure of the *Nurses Award*. Assuming that the Commission accept the reasoning in *Teachers*, the following features of the *Nurses Award* would need to be removed or changed:
- (a) the pay points for the EN;²²
 - (b) the pay points for RN 1 to RN 3;²³ and
 - (c) the grades for RN 4 and RN 5.²⁴
24. Having said this, as we advocated throughout the case in respect of personal care workers, we do accept that after a period of time, such as 3-4 years, ENs and RNs will demonstrate greater competency and proficiency through having practically applied their competence in the workplace setting and this should reasonably be factored into any reconsideration of the structure.

Progression through the incremental scale not dependent on changed work value

25. Advancement between pay points for ENs and RNs is primarily determined “*by annual movement*”:²⁵ an anachronistic device carried over from the public sector.²⁶ That is supported by the construction of the progression clause.
26. The progression clause provides:

“15.3 Progression through pay points

(a) Progression will be:

(i) for full-time employees – by annual movement; or

(ii) for part-time or casual employees – 1786 hours of experience.

Bernoth dated 29 October 2021; Witness Statement of Pauline Breen, dated 29 October 2021; NPs: See Statement of Stephen Voogt, dated 9 May 2022; Statement of Hazel Bucher, dated 9 May 2022.

²² See *Nurses Award 2020*, clause 15.1(a)(ii); clause 15.2(b)(ii); Sch A, clauses A.4.1-A.4.5.

²³ See *Nurses Award 2020*, clause 15.1(c)(i), clause 15.2(c)(i); Sch A, clauses A.5.1-A.5.5.

²⁴ See *Nurses Award 2020*, clause 15.1(c)(i), clause 15.2(c)(i); Sch A, clauses A.5.1-A.5.5.

²⁵ *Nurses Award 2020*, clause 15.3(a). See generally, *Teachers* [2021] FWCFB 2051 at [647].

²⁶ See generally, *Teachers* [2021] FWCFB 2051 at [647].

(b) Progression to the next pay point for all classifications for which there is more than one pay point will have regard to:

(i) the acquisition and use of skills described in the definitions contained in Schedule A—Classification Definitions; and”

(ii) knowledge gained through experience in the practice settings over such a period.

27. The reference to “have regard to” the acquisition and use of skills (etc) in clause 15.3(b), does not make progression through the incremental scale *dependent* on changed work value. Based on its construction, at its highest, clause 15.3(b) identifies an issue for the employer to consider: it is not a determinative factor.
28. The purely time-based nature of the consideration in clause 15.3(b) is even more clear when applying it to pay point progression for each level of RN. For example, RN 2 has pay points 1 to 5. The *appointment* to RN 2 is informed by the acquisition and use of skills described in the definitions contained in Schedule A—Classification Definitions at clause A.5.2. Such that, all persons classified at RN 2 should already meet the definition at clause A.5.2. Therefore, having regard to the classification definition of RN 2 cannot practically or meaningfully inform progression through pay points 1 to 5. It is the annual movement referred to in clause 15.2(a) that is the determinative factor.
29. Clause 15.3 in the *Nurses Award* may be distinguished from the progression clause in the *SCHADS Award* that stipulates ‘*eligibility*’ for progression from one pay point to the next within a level requires the employee to have “*demonstrated competency and satisfactory performance over a minimum period of 12 months*”.²⁷ Whilst there is an indication of the likely duration to attain such competency, progression can only occur with “*demonstrated competency and satisfactory performance*” (emphasis added): there must be a discernible change in the application of competence (demonstrated increase in proficiency) to occasion an increase in work value (as opposed to mere regard).
30. The time-based nature of progression through pay points in the *Nurses Award* is also apparent on the face of both the EN and RN classification structure, which we turn to below.

²⁷ *SCHADS Award 2010*, cl 13.3(a).

An analysis of the EN structure

31. The EN structure is an amalgam of time served and some averment to skills. An analysis of the existing structure demonstrates the material differentiator between pay points is time served.
32. Two concerning features are highlighted:
- (a) Each pay point stipulates that “*appointment*” to the next level is available based on an effluxion of no more than 12 months. The appointment appears to be mandated once a certain amount of time is completed. See example, EN pay point 2:
 - (i) “*An employee will be appointed to this pay point...*”; and
 - (ii) “*not more than one further year of practical experience in the provision of nursing care*”.²⁸
 - (b) There does not appear to be a true differentiation in skill indicators between the pay points. As indicated by the following:
 - (i) An EN is only required to “*demonstrate some*” of the skills listed.²⁹ There is no definitive number or specific type of skill indicators identified as unique or mandatory for appointment.
 - (ii) The skill indicators listed at EN pay points 3, 4 and 5 appear to be expectations that align squarely with the EN Standards of Practice – which apply to all qualified ENs. For example, having regard to the indicators of an EN’s compliance with Standard 1,³⁰ which include:
 - A provide nursing care according to the agreed plan of care, professional standards, workplace policies and procedural guidelines;³¹

²⁸ *Nurses Award 2020*, clause A.4.2(b) (emphasis added).

²⁹ *Nurses Award 2020*, clauses A.4.2 to A.4.5.

³⁰ Nursing and Midwifery Board of Australia, *Enrolled Nurse Standards for Practice* (1 January 2016).

³¹ Nursing and Midwifery Board of Australia, *Enrolled Nurse Standards for Practice* (1 January 2016) at [1.4].

- B identity and clarify their responsibilities for aspects of delegate care working in collaboration with the RN and multidisciplinary health care team;³² and
- C recognise their own limitations in practice and competence and seek guidance from the RN and help as necessary,³³

the skill indicator of “*an ability to organise, practise and complete nursing functions in stable situations with limited direct supervision*” hardly seems *uniquely* indicative of an EN pay point 3.³⁴

An analysis of the RN structure

33. Two features of the RN structure require separate consideration:
- (a) movement between the classification levels (**the levels**); and
 - (b) movement between the pay points and grades within each level (**the increments**).

The levels

34. Progression from RN level 1 to each subsequent level appears to be by “*appointment*”. By contrast to the EN structure, this is truly discretionary. For example, RN level 3 “*is appointed as such by a selection process or by reclassification...*”.³⁵
35. The levels appear to refer to specialised forms of nursing activity. For example:
- (a) RN level 2 – clinical nurse;
 - (b) RN level 3 – clinical nurse consultant, nurse manager, nurse educator; and
 - (c) RN level 4 – assistant director of nursing (clinical), assistant director of nursing (management), assistant director of nursing (education).

³² Nursing and Midwifery Board of Australia, *Enrolled Nurse Standards for Practice* (1 January 2016) at [1.5].

³³ *Ibid* at [1.6].

³⁴ *Nurses Award 2020*, cl A.4.3(c). See also Report to the Full Bench (Commissioner O’Neill, 20 June 2022) at [96]-[99]. See example, Witness Statement of Suzanne Hewson, dated 6 May 2022 at [17].

³⁵ *Nurses Award 2020*, Sch A, clause A.5.3(a)(ii).

36. Putting aside pay points, each level has a clear set of competencies, experience and responsibilities that must be acquired to be appointed/reclassified at a particular level. That “*appointment*” is not based on time served.
37. Broadly, the structure of “*levels*” within the RN structure is not problematic.

The increments

38. The primary concern arising from the RN structure is the basis for the movement between the pay points and grades within each level: they are entirely time-based increments.
39. The onus falls on the ANMF to demonstrate that automatic annual increments within each level are dependent on distinct changed work value. This has not occurred to date.
40. The evidence identified by the ANMF fails to identify any compelling basis to retain the annual increments for either ENs or RNs.³⁶ Four observations are made:
- (a) It is not disputed that the Junor Report has relevance to “*work value*” – this was a finding of the Full Bench in the *Stage 1 Decision*. However, absent specific consideration of the basis for progression from pay point 1 to pay point 2, etc – the evidence relating to identification of “*invisible skills*” for an EN or RN (or, as the ANMF put it “*the interrelationship between ‘skill’ and experience*”³⁷) is of little assistance to the question presently before the Expert Panel.
 - (b) Associate Professor Junor’s analysis of the different “*invisible skills*” associated with RN1, RN2, RN3, etc is also of no utility to the question presently before the Commission. This is because the analysis is limited to the consideration of “*invisible skills*” for each RN “**level**”: the evidence does not identify any discernible change in competency that justifies the basis for maintaining yearly increments (i.e. the pay points or grades for each RN level).³⁸
 - (c) Annexure 9 of the Junor Report does not assist the Commission to differentiate between shifts in competency (or other increases in work value) between EN

³⁶ See ANMF Submissions at [69]-[74], citing Junor Report, Annexures 4 and 9.

³⁷ ANMF Submissions at [71].

³⁸ See, Junor Report, pages 29-31.

pay points 1 to 5 or the pay points and grades for RN levels 1 to 5. This is because:

- (i) it is a *review of literature* on skill invisibility, under-recognition, under-valuation and gender. It does not grapple with the specific classifications in the *Nurses Award* and, more importantly, it does not address the question of progression between pay points;³⁹ and
 - (ii) Associate Professor Junor also acknowledges that she cannot “*comment authoritatively on current wage relativities in the aged care sector, or on wage movements over time*” – nor does she attempt to.⁴⁰
- (d) The evidence of Helia Brooks does not address the incremental pay point scales for RN level 1 (etc). The reference to “*incremental progression*” at paragraphs [13] and [14] of her statement concerns progression between *levels* not *pay points*.
41. The ANMF Submissions do not appear to address the question of progression through pay points within the *Nurses Award*. The basis for that approach is tied to the historical development of the *Nurses Award*.⁴¹ Historical decisions to maintain relativities should be approached with caution given the lack of reasoning provided (see example, “*within the acceptable range of relativities*”).⁴²
42. The notion that there is something quantifiable about a 12-month anniversary is not currently supported by evidence and better considered as being grounded in old public sector practice.
43. The analysis above at paragraphs [25] to [30] highlights the limited work to be done by the reference to “*skills*” in clause 15.3(b) in the *Nurses Award*.
44. Further, in circumstances where the Expert Panel have held that the minimum rates in the *Nurses Award* were never properly set and were also infected by gender-based

³⁹ See Junor Report, Annexure A.

⁴⁰ See Junor Report, page 63 at [244].

⁴¹ See ANMF Submissions at [65]-[68].

⁴² *Paid Rates Review Decision* [1998] AIRC 1413, 123 IR 240, Print Q7661; *Stage 3 Decision* [2024] FWCFB 150 at [111]-[135].

undervaluation, it would certainly defy the odds if the pay points carried over for ENs and RNs were not impacted.

Answering the question posed by the Expert Panel

45. To answer the question posed by the minimum rate increments and relativities issue:
- (a) The pay points within the EN classification structure are based primarily on years of service.⁴³ They are not consistent with properly fixed minimum rates because they are not based on identified work value increase milestones.
 - (b) The pay points within each level of RN (including the 'grades' for RN 4 and 5) are entirely based on years of service rather than the essential elements of qualifications, applied competence and acquired experience and responsibility.⁴⁴
46. If the Expert Panel were minded to vary the time-based increments in the *Nurses Award*, the following matters are noted:
- (a) section 139(1)(a) of the *Fair Work Act 2009* (Cth) reinforces the inappropriateness of annual time-based increments within modern awards; and
 - (b) clause 15.3 of the *Nurses Award* would benefit from amendment to ensure reference to the anachronistic practice of time-based progression is removed from the award.
47. If the Expert Panel affirm the proposition that time-based increments are not appropriate for modern awards adopting *Teachers*, the Expert Panel will need to make some changes to the EN and RN classification structures because certain elements of the current structures are primarily time based.

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⁴³ See *Nurses Award 2020*, clause 15.1(a)(ii); clause 15.2(b)(ii); Sch A, clauses A.4.1-A.4.5.

⁴⁴ See *Nurses Award 2020*, clause 15.1(c)(i), clause 15.2(c)(i); Sch A, clauses A.5.1-A.5.5.